



State of Arizona
Department of Education

Tom Horne
Superintendent of
Public Instruction

CN# 02-06

MEMORANDUM

To: School Health & Nutrition Program Sponsors

From: Mary Szafranski, Deputy Associate Superintendent
Arizona Department of Education, Health & Nutrition Unit

Holly Mueller, Program Director
Arizona Department of Education, School Health & Nutrition Programs

Date: August 29, 2005

RE: Q & A-Procurement Procedure Guidelines

The purpose of this memo is to provide further guidance and understanding regarding various procurement related issues related to the Child Nutrition Programs (CNP). Therefore, the following issues have been presented in a Q & A format based on responses from USDA to questions from a Local Education Agency (LEA).

- Q1. Can a LEA enter into a sole source procurement with a supplier that advertises itself as the sole provider of a product or service?
- A. No. In the CNP a sole source situation only occurs when the goods or service are available from only one manufacturer through only one distributor or supplier. The decision that a sole source situation exists must be made by the LEA, not the supplier. While one supplier may offer goods and services that contain features not available from other suppliers, the LEA must be able to document that those specific features are required, not just preferred.
- Q2. What happens if an LEA enters into a sole source contract improperly?

- A. When solicitation and contract deficiencies are identified, the LEA cannot fund the contract costs, including any ongoing and maintenance costs, from the nonprofit food service account. Therefore, if an LEA is unsure whether a sole source situation exists or not, please contact ADE for assistance.
- Q3. Can an LEA amend an existing contract to add a new deliverable such as a point of service (POS) system at the recommendation of their food service management company (FSMC), when the FSMC has indicated that the company providing the POS is a preferred provider of the FSMC?
- A. Generally not if the new deliverable represents a material change to the contract. Prior to deciding whether to amend an existing contract or conduct a new procurement, the LEA must first determine whether the amendment is permitted under the terms of its original solicitation and resulting contract. Additionally, the LEA must also determine whether the amendment would be permitted pursuant to applicable State and local procurement requirements. When the amendment was not addressed in the solicitation documents, then the LEA must determine if the amendment creates a material change to the existing contract. *In the interest of open and fair competition, ADE reserves the right to review material changes for compliance with the original solicitation.*
- Q4. Is there a dollar threshold that must be used when determining whether a change to an existing contract is material?
- A. No. While the cost of a proposed amendment is a factor that the LEA should use in determining whether a proposed change is material, there is no minimum threshold. As previously discussed in the answer to Q3, a key factor in determining materiality is whether other bidders knowing of the change would have bid differently.
- Q5. How should an LEA determine whether a purchase should be made using sealed bidding or competitive proposals?
- A. When deciding whether sealed bidding using an invitation for bid (IFB) or competitive proposals using a request for proposal (RFP) should be used, the LEA needs to consider a number of factors. Commercially available items should be acquired using the sealed bidding method because the items can be adequately identified, ancillary services such as delivery and handling can be specified, and the requirements for a responsible and responsive bidder can be described. When these conditions exist, the only remaining factor in the award of the contract is cost.

On the other hand, when developmental work is needed, the acquisition generally lends itself to competitive proposals. In developmental acquisitions, the expectations and outcomes can usually be met by more than one method and acceptable offers will differ both technically and financially. When deciding to use competitive proposals, the LEA must also have sufficient skill and expertise to evaluate and rank proposals and

conduct negotiations with top offerors. Since the response to an RFP consists of two distinct elements, the technical proposal and the cost proposal, the negotiation process requires significant experience and skill in negotiation.

Q6. Doesn't using an RFP allow a LEA to award a contract without price being the most important factor?

A. In using the RFP process the goal should always be to try to obtain the best product/services at the lowest price. Federal regulations require that when using the competitive proposal method, the award is made with "price and other factors considered." Therefore, it is important to remember that the LEA still has a responsibility to obtain the best pricing available. To this end, it's critical to conduct an evaluation process that determines which proposals are deemed acceptable and most likely to receive an award with or without price being considered. However, once you enter into negotiations with the final offerors then the award should be made to the offeror submitting the lowest price since all of the negotiated offers have been deemed acceptable.

Q7. Must LEAs always negotiate when using competitive proposal method?

A. While the negotiation phase is not mandated, the primary benefit of this procurement method is lost if negotiations are not conducted. An LEA that will not be exercising its rights to negotiate should seriously evaluate whether competitive proposals are the appropriate procurement method for its planned acquisitions since it can obtain the same results using sealed bidding.

Q8. Recently, one of our public LEAs received a bid protest? Should we send the protest to FNS?

A. No. Pursuant to 3016.36 (b) (12), LEAs must have procedures in place to handle disputes relating to their procurements and are responsible for resolving bid protests. In addition information about the bid protest should be sent to ADE.

Q9. In a memorandum from FNS, "Recent Procurement Procedure Questions", dated April 29, 2005, (Ref. CN #53-05) included an attachment, "Developing an Open Process for the Purchase of a Software System". The attachment addresses the Schools Interoperability Framework (SIF), a nonprofit membership organization. Does this mean that FNS endorses SIF?

A. No. It is not the practice of FNS to issue endorsements.

If you have any questions or concerns regarding this memo, please contact the Health and Nutrition Contracts Officer, Brian Walsh at (602) 542-6208 or bwalsh@ade.az.gov.